92-1428

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

GEORGE H. BRANT
Counsel of Record
JAMES P. DALEY
RONALD J. CUCHNA
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
165 North Canal Street
Chicago, Illinois 60606
(312) 559-6081
Counsel for Petitioner

Of Counsel:
HUGH C. GRIFFIN
LORD, BISSELL & BROOK
115 South LaSalle Street
32nd Floor
Chicago, Illinois 60603
(312) 443-0342

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

This case is brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 *et seq.*, by a railroad employee who sought to recover for injuries he sustained when he fell from a railroad bridge on which he was working. At trial, the jury was instructed that it could find the railroad employer negligent for violating a regulation promulgated by the Occupational Safety & Health Administration ("OSHA"), despite the fact that Federal Courts of Appeal had previously held that a preemptive declaration published by the Federal Railroad Administration ("FRA") in 1978 specifically foreclosed the railroad job site from OSHA regulation. The Appellate Court of Illinois reasoned that federal law was controlling and unanimously held that the OSHA instruction constituted reversible error.

The divided Supreme Court of Illinois reversed the appellate court and affirmed the trial court. The state high court determined to ignore all applicable federal precedent. Instead, the court based its independent decision on a non-binding, retrospective interpretation of the FRA's 1978 declaration which was published by the FRA in 1991, over seven years *after* the accident at issue and over one year *after* the trial had been completed.

The questions presented are as follows:

1. Whether state courts may ignore a settled body of contrary federal law and explicitly stated national transportation policy and apply OSHA regulations on a piecemeal, *ad hoc* basis to railroad job sites previously declared to be within the FRA's exclusive regulatory jurisdiction?

2. Whether settled federal decisional law and express Congressional policy clearly delineating the FRA's exclusive

regulatory jurisdiction over specified railroad job sites may be obviated by a non-binding, agency disclaimer of jurisdiction, when the disclaimer is in conflict with the FRA's own prior pronouncements, and is issued *thirteen years after* the document it purports to interpret?

3. Whether state courts may ignore federal decisional law in determining what constitutes negligence under the FELA and create employer liability under the Act by imposing their own independent concepts of negligence?

4. Whether, as a matter of constitutional due process of law, a settled interpretation of a federal regulation may be overturned after trial and a new interpretation retroactively applied to affirm a finding of employer negligence under the FELA and a $3.5 million damage award?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below are petitioner Chicago and North Western Transportation Company and respondent, Tracy Templeton, who is the plaintiff in a personal injury action brought against petitioner under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*

Petitioner Chicago and North Western Transportation Company is a wholly-owned subsidiary of Chicago and North Western Holdings Corp. Petitioner's subsidiaries and affiliates are:

Iowa Transfer Railway Company
Kansas City Terminal Railway Company
MT Properties, Inc.
Midwestern Railroad Properties, Inc.
North Western Leasing Company
Peoria and Pekin Union Railway Company
TTX Company
Transportation Data Exchange, Inc.
Western Railroad Properties, Inc.
Wisconsin Town Lot Company

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Petition For Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Chicago and North Western Transportation Company ("North Western"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in the above entitled proceeding.

OPINIONS BELOW

The divided opinion of the Supreme Court of Illinois is reported at 151 Ill.2d 325, 603 N.E.2d 441 (1992). It is reprinted in the separate appendix at Appendix A (p. A1).[1/] Its order denying a rehearing is unreported and is attached hereto as Appendix B (p. A21). The opinion of the Appellate Court of Illinois, First District, is reported at 211 Ill.App.3d 489, 570 N.E.2d 467 (1991). It is reprinted at Appendix C (p. A22).

[1/] Due to its length, the Appendix is printed as a separate document, per Rule 14(h). Page numbers in parentheses preceded by "A" refer to Appendix pages.

The trial court's order entering judgment against North Western on a jury's verdict is not reported, nor is that court's order denying North Western's post-trial motions, but both orders are reprinted at Appendices D and E (pp. A33-35).

JURISDICTION

The divided opinion of the Supreme Court of Illinois (p. A1) was entered on July 30, 1992. A timely petition for rehearing was denied on November 30, 1992. (p. A21). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Rule 10.1(b) and (c) of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED[2/]

Constitutional Provisions Involved:

Article VI(2), United States Constitution
Amendment 14, United States Constitution

Federal Statutes Involved:

Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* (1908)
Federal Railroad Safety Act, 45 U.S.C. §421 *et seq.* (1970)
Rail Safety Improvement Act of 1988, 45 U.S.C. §431(e) *et seq.* (1988)
Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.* (1970)

Federal Regulations Involved:

29 C.F.R. §§1926.104-1926.105
41 Fed.Reg. 50302-03 (1976)
42 Fed.Reg. 22184-85 (1977)
43 Fed.Reg. 10583-90 (1978)
56 Fed.Reg. 3434-41 (1991)

[2/] The relevant constitutional and statutory provisions are set forth verbatim in the separate appendix at Appendix F (p. A36), while relevant excerpts from the lengthy federal regulations involved may be found in Appendices G through K (pp. A41-73).

STATEMENT OF THE CASE

North Western is a Chicago-based railroad which owns track, roadbed and associated structures throughout the midwestern United States. As a member of the railroad industry, it is subject to a broad array of federal statutes pertaining to employee health and safety, including the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 *et seq.* (1908); the Federal Railroad Safety Act, 45 U.S.C. §421 *et seq.* (1970); and the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. §651, *et seq.* (1970).

In 1985, North Western was sued under the FELA by Tracy Templeton, one of its employees. Although the FELA is a federal cause of action, state courts are awarded concurrent jurisdiction under the Act. 45 U.S.C. §56. Templeton elected to file his suit in the Circuit Court of Cook County, Illinois.

Templeton sustained personal injuries on January 27, 1984, while working on a railroad bridge at South Pekin, Illinois. His injury occurred when he fell through a temporary opening in the bridge deck. Templeton was not wearing any type of safety belt or restraining device. North Western's bridge safety rules did not require that an employee utilize a safety belt in all facets of bridge work. Safety belts were available, but North Western allowed its employees to utilize the belts at their own discretion.

A. Trial Court Proceedings

In order to fault North Western and to minimize his own contributory negligence, plaintiff sought to introduce evidence at trial that North Western's bridge project was conducted in alleged violation of regulations promulgated by the Occupational Safety and Health Administration ("OSHA"). In particular, plaintiff contended that North Western violated OSHA construction

regulations by failing to require plaintiff to use a safety belt at all times, and by failing to secure a safety catch net under the bridge.[3/]

North Western resisted plaintiff's effort to label it as a federal law violator before the jury. In a pretrial motion *in limine* supported by a memorandum of law, North Western argued that the railroad's bridge workers were not subject to OSHA's construction regulations, and that it would constitute grievous error to admit evidence suggesting that North Western violated OSHA's regulations. North Western contended that the regulation of safe working conditions on railroad bridges was within the exclusive jurisdiction of the Federal Railroad Administration ("FRA"), pursuant to the authority vested in the Secretary of Transportation by the Federal Railroad Safety Act ("FRSA"). 45 U.S.C. §431. (See, p. A37).

North Western urged the trial court to consider that significant distinctions existed in the enabling legislation under which OSHA and the FRA operated. Although OSHA was authorized to prescribe and enforce health and safety regulations generally affecting American industry, the OSH Act itself declared that "Nothing in this chapter...shall apply to working conditions of employees with respect to which other federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. §653(b)(1). (See, pp. A37-38). North Western contended that the FRA was just such a federal agency. Pursuant to the FRSA, the FRA was authorized to "prescribe, as necessary, appropriate rules, regula-

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[3/] The specific OSHA regulations, at issue, 29 C.F.R. §§1926.104 and 1926.105, are reproduced at Appendix G (pp. A39-40).

tions, orders and standards for *all* areas of railroad safety..." 45 U.S.C. §431 (emphasis added). (See, p. A37).

North Western cited the trial court to federal decisional law which had defined the competing jurisdictions of the two federal agencies. Those cases instructed that the more generic, industry-wide regulations promulgated by OSHA were rendered inapplicable to the railroad industry whenever the FRA exercised its primary statutory jurisdiction by articulating a position (i) that its own regulations and no others should apply to certain working conditions within the railroad industry or (ii) that certain working conditions within the industry should go unregulated. *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). *Southern Ry. v. Occupational Saf. & H. Rev. Comm'n.*, 539 F.2d 335, 339 (4th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976).

North Western also cited the trial court to an FRA Policy Statement which was issued on March 14, 1978, for the specific purpose of assisting "the courts and the Occupational Safety and Health Review Commission in understanding the extent to which FRA *has exercised* its statutory jurisdiction." 43 Fed.Reg. 10585 (p. A45) (emphasis added).[4/] In the Policy Statement, the FRA acknowledged that both "OSHA and FRA seek to assure workplaces are as safe as possible..." but that "within the area of railroad operations, it is FRA which must decide what regulations are necessary and feasible." 43 Fed.Reg. 10586 (p. A47). To that end, FRA declared its exclusive jurisdiction over the "safety

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[4/] Relevant excerpts from the 1978 FRA Policy Statement are reprinted at Appendix H (pp. A41-59).

of railroad operations" which it generally divided into three fields: "(1) Track, roadbed and associated devices and structures, (2) equipment, and (3) human factors." 43 Fed.Reg. 10586 (p. A48).

While the FRA Policy Statement affirmed that the FRA, itself, might undertake "additional regulatory initiatives" in the three regulatory fields "as may be necessary," its declaration that OSHA's regulations should not apply was unconditional. The Policy Statement explicitly pronounced that "piecemeal regulation of individual hazards *in any* of the three regulatory fields *by any other* agency of government would be disruptive and contrary to the public interest." 43 Fed.Reg. 10586 (p. A48) (emphasis added).

Not only did the Policy Statement explicitly state that health and safety issues pertaining to "track, roadbed and associated devices and structures" were reserved for the FRA's exclusive jurisdiction, but the Statement also specifically addressed railroad bridges in illustrating FRA's intentions. The FRA stated that *"OSHA regulations would not apply to...railroad bridges*, turntables, and similar structures or to walkways, beside the tracks in yards or along the right-of-way" because "these are *areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety.*" 43 Fed.Reg. 10587 (pp. A54-55) (emphasis added).

The FRA declared that the proper protection of employees in such operating areas was "an integrated undertaking." The agency reasoned that, as a general rule, in such areas, "it is not possible to regulate an individual hazard without impacting on other, related working conditions...." Therefore, the FRA

pronounced that it was essential to national transportation policy "that the safety of railroad operations be the responsibility of a single agency...." 43 Fed.Reg. 10585 (p. A47).

Finally, North Western cited the trial court to FELA precedent from the United States Court of Appeals, Fifth Circuit, which involved an employee's fall from a railroad bridge under circumstances all but identical to the case at bar. *Velasquez v. Southern Transp. Co.*, 734 F.2d 216 (5th Cir. 1984). *Velasquez* held that OSHA's regulations were preempted from applying to railroad bridges by the FRA's 1978 Policy Statement. Moreover, *Velasquez* held that the issuance of jury instructions directing a jury that they might find railroad negligence based upon an alleged violation of OSHA's regulations would constitute reversible error. *Velasquez*, 734 F.2d at 218-19.

Nonetheless, North Western's motion *in limine* was denied. Plaintiff was permitted to introduce evidence of the OSHA regulations and to call an "expert witness" to testify that the OSHA regulations were violated by North Western. Furthermore, the trial court determined to ignore *Velasquez v. Southern Transp. Co., supra*. Over North Western's objections, the court instructed the jury that it could find North Western negligent for violating the OSHA catch net regulation.[5/]

So instructed, the jury returned a verdict for plaintiff in the sum of $3.5 million, after finding that plaintiff's contributory negligence constituted only 14% of the total fault for his accident. The trial court entered judgment on the jury's award (p. A33). The court also denied North Western's post-trial motions which,

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[5/] The instruction is set out at Appendix L (p. A74).

inter alia, complained of the court's adverse OSHA rulings and other alleged errors. (See p. A35).

B. Proceedings Before the Appellate Court of Illinois

On appeal, the Appellate Court of Illinois, First District, unanimously reversed the trial court and remanded the case for a new trial. That opinion is cited at 211 Ill.App.3d 489 and 570 N.E.2d 467. (See, pp. A22-32). The appellate court focused solely on the FRA preemption issue. The court reasoned that the FRA had primary regulatory authority over the railroad industry, and that the FRA's 1978 Policy Statement effectively established the FRA's exclusive jurisdiction within the areas of railroad operations, to include "railroad bridges." Thus, the court concluded that the authority of the Secretary of Labor in that area was foreclosed. (See, pp. A28-29).

The appellate court also noted that Congress had acquiesced in the FRA's assertion of exclusive jurisdiction over the hazards of working on railroad bridges, even though the FRA had not initiated any subsequent regulatory initiatives addressing bridge worker fall protection. (p. A28). Specifically, in 1988, long after publication of the 1978 Policy Statement, Congress passed the Rail Safety Improvement Act of 1988. Therein, Congress charged the Secretary of Transportation and the FRA with the sole responsibility of determining what, *if any*, safety equipment regulations should be developed for railroad bridge work:

> The Secretary shall within one year after June 22, 1988, issue such rules, regulations, orders and standards *as may be necessary* for the safety of maintenance of way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used.

45 U.S.C. §431(n) (emphasis added).

Just prior to oral argument before the appellate court, plaintiff cited the court to a non-binding Notice of Proposed Rulemaking which the FRA published in 1991. 56 Fed.Reg. 3434 (1991).[6/] The FRA's proposed rulemaking was in response to the 1988 Congressional directive that the FRA publish such fall protection regulations "as may be necessary" for the safety of railroad bridge workers. *Id.* The preamble to the 1991 Notice revisited the 1978 FRA Policy Statement and offered a retrospective interpretation which plaintiff embraced. According to the preamble, the FRA did not expect to be taken literally when it stated at 43 Fed.Reg. 10587 (1978) that: "OSHA regulations would not apply to...railroad bridges" because they were "so much a part of the operating environment..." (pp. A53-54). According to the 1991 interpretation of the 1978 Policy Statement, the FRA only "intended to displace OSHA regulations with respect to the surfaces on bridges..., but did not intend to prevent OSHA from exercising its more general responsibilities... with respect to fall protection...." 56 Fed.Reg. 3435 (p. A70).

The appellate court, however, considered the 1991 interpretation of the 1978 Policy Statement to be unpersuasive (pp. A27-28). Federal decisional law had already determined that the FRA's explicit assertion of exclusive jurisdiction in 1978 had effectively ousted OSHA from the railroad "operating environment," to include railroad bridges. As the appellate court noted, the preamble to the 1991 Notice included just such a concession:

> ...Both courts and the Occupational Safety and Health Review Commission have held that the assertion of authority in a policy statement constitutes an exercise of FRA's

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[6/] Relevant excerpts from the Notice of Proposed Rulemaking are reprinted at Appendix K (pp. A66-73).

> statutory authority under the rail safety laws sufficient to displace OSHA standards pursuant to section 4(b)(1) of the OSHA Act with respect to health and safety issues intrinsic to 'railroad operations.' *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Consolidated Rail Corp.*, 10 OSHC (BNA) 1577 (1982). 56 Fed.Reg. 3435 (1991)

(See, p. A28).

Under such circumstances, the appellate court concluded that the FRA's 1991, non-binding interpretation of the 1978 Policy Statement was not entitled to significant weight. Instead, the appellate court determined to follow the persuasive authority of settled federal law, including *Velasquez v. Southern Pacific Transp. Co.*, *supra*, in finding that the trial court committed reversible error in instructing the jury that North Western could be found negligent for allegedly violating OSHA's inapplicable regulations (pp. A31-32).

C. Proceedings Before the Supreme Court of Illinois

Plaintiff petitioned the Supreme Court of Illinois for further review characterizing the appellate court opinion as a "potentially disastrous opinion for the entire Illinois court system." According to plaintiff's petition, the Illinois judiciary was not "bound to slavishly follow" federal decisional law in determining rights and obligations under the FELA, because the United States Courts of Appeal had not shown a similar deference to the highest court of Illinois. Plaintiff contended that although "the courts of Illinois may be compelled" to follow the decisions of the United States Supreme Court, the state courts were not obliged to defer to those of the United States Courts of Appeal. Therefore, plaintiff urged the Supreme Court of Illinois to reverse the appellate court, so

that "the beneficial effect of OSHA is not denied other railroad workers in Illinois."

The Supreme Court of Illinois not only granted plaintiff's petition and accepted his appeal, but in a divided opinion, the state high court reversed the appellate court and declared that OSHA's regulations did apply to railroad bridges at the time of plaintiff's 1984 accident. That opinion is cited at 151 Ill.2d 325 and 603 N.E.2d 441. (See, pp. A1-20).

The majority of the divided state court found the FRA's 1978 Policy Statement to be "ambiguous" and "unclear" when applied to railroad bridges (pp. A6, A8-9). According to the court's opinion, the Policy Statement is "subject to two competing interpretations which are equally reasonable" (p. A9). In resolving the perceived ambiguity, the majority reasons that it should give controlling weight to the 1991 Notice of Proposed Rulemaking, which interpreted the 1978 Policy Statement to only foreclose OSHA's regulations from applying to the surfaces of railroad bridges, and not to safety hazards presented by possible falls from such surfaces (p. A7).

The state high court opinion declares that it is not necessary to "consider the question of whether Illinois courts are bound to follow the decisions of lower Federal courts when interpreting Federal law" (p. A10). The court states that federal decisional law may be avoided altogether, if one simply looks to the administrative construction of a disputed statute or regulation. The majority reasons that "(b)ecause the Railroad Administrator's 1991 notice of proposed rulemaking contains an interpretation [of the 1978 Policy Statement] which is not plainly erroneous, we will follow the Railroad Administrator's interpretation rather than the *Velasquez* court" (p. A10).

The court also refuses to attach any significance to relevant federal legislation. The court recognizes that the Rail Safety Improvement Act of 1988, 45 U.S.C. §431(n), directed FRA, not OSHA, to issue all bridge fall protection regulations "as may be necessary," but the court reasons that the statute did not answer the question of whether the FRA had already ceded its jurisdiction to OSHA prior to 1988 (p. A10).

The state court's dissenting opinion, however, finds the majority's holding and reasoning to be without any "legitimate basis" (p. A20). The dissent would affirm the decision of the Appellate Court of Illinois. The dissenting justices find no ambiguity in the FRA's 1978 Policy Statement declaring the FRA's exclusive jurisdiction over railroad bridges; and, even if ambiguity is assumed *arguendo*, the dissent criticizes the majority's "illogical" reliance upon the 1991 Notice to resolve any uncertainty in the 1978 Policy Statement (pp. A16-18).

The dissent points out that by elevating the 1991 interpretation into law, and choosing to ignore contrary federal precedent, the majority creates the very confusing, overlapping regulatory jurisdiction over the nation's railroads which Congress and the FRA clearly intended to avoid (p. A16). According to the majority's "absurd" rationale, OSHA and the FRA would share jurisdiction over the same occupational hazard, namely falling from a railroad bridge. The FRA would have sole authority to determine the appropriate use of surface safety aids, such as construction barricades, side railings, toe boards and hole covers over and around bridge floor openings, while OSHA would share authority to determine how an employee should be protected when, if ever, he should step through such an opening, or fall over the edge of the bridge (p. A17).

North Western responded to the state high court's divided opinion by filing a petition for rehearing. The railroad's petition contended that the state court's retroactive application of the 1991 interpretation of the 1978 Policy Statement raised substantial issues of due process of law under the United States Constitution which the majority of the court failed to appreciate. If, as the majority concluded, the 1978 Policy Statement was so "ambiguous" that it was subject to "two equally reasonable" competing interpretations, it surely could not be fair to retroactively resolve the perceived ambiguity against North Western based upon a regulatory interpretation which post-dated plaintiff's accident and conflicted with pre-existing federal decisional law. More particularly, North Western urged that it was fundamentally unfair of the court to affirm a finding of negligence under the FELA and hold the railroad liable to pay $3.5 million in damages for "violating" OSHA construction regulations, after the court, itself, had judicially determined that North Western could have "reasonably" believed that the OSHA construction regulations did not apply to railroad bridges.

The state high court, however, offered no comment in denying North Western's petition for rehearing (p. A21). Thus, its opinion reversing the Appellate Court of Illinois stands. That opinion is now the law of the case and the law of Illinois.

REASONS FOR GRANTING THE WRIT

I.
THE SUPREME COURT OF ILLINOIS' REFUSAL TO FOLLOW THE OVERWHELMING WEIGHT OF FEDERAL AUTHORITY ESTABLISHING THE JURISDICTIONAL BOUNDARIES OF TWO FEDERAL AGENCIES OVER THE NATIONAL RAILROAD INDUSTRY SHOULD NOT BE ALLOWED TO STAND

The state high court's unprecedented expansion of OSHA jurisdiction in this case will promote overlapping OSHA/FRA jurisdiction over railroad operations in derogation of national transportation policy and cause great confusion in cases brought under the FELA. Yet, of even greater significance and concern is that the state court felt utterly free to resolve issues of federal statutory and regulatory interpretation contrary to established federal precedent and stated national transportation policy.

Rarely has a state court decision so devastatingly demonstrated the wisdom inherent in the observation that federal statutes may prove to be "awkward guests" in state courts.[7/] If allowed to stand, the Illinois opinion will be a catalyst for further attempts to undermine the oft-stated Congressional goal of uniformity in railroad safety regulation. If railroad bridges -- one of the areas explicitly reserved exclusively to FRA jurisdiction in the 1978 Policy Statement -- can be subjected to overlapping, piecemeal OSHA jurisdiction, then so can countless other areas of railroad operations previously believed to be solely within the FRA's domain. The result will be a multiplicity of future attempts to inject OSHA regulations into other FELA claims and a prolifera-

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7/ Herman, Susan N., *Beyond Parity: Section 1983 and the State Court*, 54 Brook. L. Rev. 1057 (1989).

tion of inconsistent results and further appeals which will undermine the Congressional goal of "a uniform body of regulations and enforcement" in the railroad industry. *See*, Federal Railroad Safety Act, 45 U.S.C. §434; H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in [1970] U.S. Code Cong. & Admin. News 4104, 4109-4111.

A. The Illinois Court's Decision Squarely Conflicts With Federal Precedent Delineating the Relationship Between OSHA and the FRA and Uniformly Awarding the FRA Exclusive Jurisdiction Over Railroad Bridges

The state high court's opinion is written as though it were one of first impression when, in fact, all of the federal questions it addressed had previously been resolved by Congress, the FRA, the OSHA Review Commission, and the federal courts. Those federal deliberative and adjudicatory bodies had already created an entire fabric of consistent, well-reasoned law which the state court chose not only to ignore, but to contradict.

The federal courts have not been unmindful of the salutary purpose of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§651-678, and the regulations authorized to be issued thereunder. The federal courts have, however, consistently declared that the broad, generic regulations promulgated under the OSH Act are rendered inapplicable according to the OSH Act's own terms (29 U.S.C. §653(b)(1)) whenever an industry-specific agency, such as the FRA, should exercise its primary jurisdiction over the working conditions at issue. *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Southern Ry. v. Occupational Saf. & H. Rev. Comm'n.*, 539 F.2d 335, 339 (4th Cir. 1976), *cert. denied* 429 U.S. 999 (1976).

Southern Ry. was one of the first appellate court opinions to address the preemptive impact of FRA pronouncements as measured against Section 4(b)(1) of the OSH Act (29 U.S.C. §653(b)(1)). In *Southern Ry.*, the Secretary of Labor took the position that the phrase "working conditions" appearing in Section 4(b)(1) should be understood to mean "particular, discrete hazards" encountered by an employee in the course of his job activities. Accordingly, the Secretary argued that OSHA could extend and maintain its jurisdiction in every "nook and cranny" of the railroad working environment not covered by a competing standard or regulation promulgated by the FRA. *Id.* at 338.

The Fourth Circuit, however, flatly rejected the Secretary's interpretation of Section 4(b)(1). *Id.* at 339. Instead, the Court of Appeals considered the definition provided in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) to be dispositive, because this Court there instructed that the phrase "working conditions" should be defined to include "surroundings" as well as "hazards." *Corning Glass Works*, 417 U.S. at 202. Therefore, the Fourth Circuit concluded that should the FRA exercise its statutory authority over any environmental area in which an employee customarily goes about his daily tasks, "the authority of the Secretary of Labor in that area is foreclosed." *Southern Ry.*, 539 F.2d at 339.

Southern Pacific Transp. Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977), reached the same conclusion, again citing *Corning Glass Works*. In *Southern Pacific*, the Fifth Circuit acknowledged that the FRA had authority to oust OSHA's regulations from applying to the railroad industry, whether or not the FRA imposed like regulations:

> Neither OSHA itself nor the existence of OSHA regulations affects the ability of the primary regulatory agency, here the FRA, to articulate its regulations as it chooses. Much of their displacing effect will turn on that articulation. Section 4(b)(1) means that any FRA exercise directed at a working condition -- defined either in terms of a "surrounding" or a "hazard" -- displaces OSHA coverage of that working condition.... Furthermore, as the dominant agency in its limited area, the FRA can displace OSHA regulations by articulating a formal position that a given working condition should go unregulated or that certain regulations -- and no others -- should apply to a defined subject.

Southern Pacific Transp. Co., 539 F.2d at 391-92. See also, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Other federal courts of appeal have concluded that the FRA's expansive March 14, 1978 Policy Statement actually foreclosed entire areas of the railroad industry to OSHA's regulations, even though the Policy Statement did not publish competitive regulations addressing each perceived safety hazard previously assessed by OSHA's more generic regulations. *Velasquez v. Southern Pacific Co.*, 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm'n. of Ohio*, 727 F.Supp. 367, *aff'd*, 926 F.2d 567 (6th Cir. 1991). Also see, *Norfolk & W. Ry. v. Burns*, 587 F.Supp. 161 (S.D. Mich. 1984).

In particular, uniform federal precedent has read the express language of the Policy Statement to plainly include railroad bridges within the FRA's exclusive jurisdiction:

> Finally, in 1978, the FRA issued a statement indicating which aspects of the railroad industry fall under its exclusive jurisdiction thereby displacing applicable OSHA regulations: "OSHA regulations would not apply to...railroad bridges.... These are areas which are so much a part of the operating environment that they must be regulated by the agency with

primary responsibility for railroad safety. 43 Fed.Reg. 10587 (1978)."

Norfolk & W. Ry. v. Public Utilities Comm'n. of Ohio, 727 F.Supp. at 370, *aff'd*, 926 F.2d 567. *Accord*: *Velasquez v. Southern Pacific Co.*, *supra*.

OSHA's own Review Commission has interpreted the FRA's 1978 Policy Statement just as literally. In *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), OSHA'S Review Commission recognized that "The FRA policy statement of March 14, 1978 is an exercise of statutory authority within the meaning of section 4(b)(1)...." 10 OSHC at 1579. In the same proceeding, the OSHA Review Commission recognized that the FRA was "the experienced and expert agency in railroad safety matters" and that the 1978 Policy Statement constituted a clear exercise of FRA's authority to foreclose OSHA's regulations from applying to those railroad facilities and structures enumerated in the Statement. 10 OSHC at 1579-81.

B. The State High Court's Opinion Conflicts With All Reasonably Contemporaneous Statements of FRA Intent

All reasonably contemporaneous expressions of FRA intent confirm that the FRA meant what it said in the 1978 Policy Statement -- safe working conditions on railroad bridges are subject to exclusive FRA jurisdiction and are outside of OSHA's purview.

The FRA has consistently gone "on record" against an expansive OSHA jurisdiction. In a memorandum prepared by the General Counsel for the Department of Transportation in 1975, FRA's counsel complained that OSHA's reluctance to see its authority properly limited by Section 4(b)(1) of the OSH Act was preventing an amicable resolution of the two agencies' jurisdic-

tions.[8/] In the memorandum, the FRA counsel took great exception to OSHA's reluctance to recognize the doctrine of negative preemption, whereby the FRA might oust OSHA without promulgating competing regulations:

> Apparently, in the view of OSHA, the failure of an agency to promulgate a standard because none is needed, or the failure of an agency to promulgate a standard which states a particular condition need not be met, would constitute a failure of the agency to exercise its jurisdiction. Rejection by OSHA of "negative regulation" ignores reality.

Vol. 4, Occ. Saf. & H. Rep., p. 1073.

Even before it published its 1978 Policy Statement, the FRA exercised its exclusive jurisdiction over safe working conditions on railroad bridges based upon its special expertise and knowledge concerning the railroad industry. In November, 1976, the FRA addressed the issue of whether walkways should be required as a form of employee fall protection on all railroad bridges. 41 Fed.Reg. 50302 (1976).[9/] This FRA rulemaking was terminated in April, 1977 when the FRA concluded that such a mandate could not be justified because it would impose significant added financial burdens on the railroad industry. The FRA determined that diverting railroad resources from other maintenance and improvement projects would not serve the overall interests of employee safety. 42 Fed.Reg. 22185 (1977).[10/]

[8/] Memorandum of the General Counsel for the Department of Transportation re: "Interpretation of Section 4(b)(1) of the Occupational Safety Act of 1970." Vol. 4, Occ. Saf. & H. Rep. 1072, 1074 (B.N.A. 1975). Also attached hereto as Appendix M (p. A75).

[9/] Relevant excerpts from this notice of proposed rulemaking is attached hereto as Appendix I (p. A60).

[10/] Relevant excerpts from the FRA's decision is attached hereto as Appendix J (p. A62).

Following its publication of the 1978 Policy Statement, the FRA continued to assert exclusive jurisdiction over areas, such as railroad bridges, which pertained to the industry's operating environment. For example, in *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), evidence provided by the FRA helped convince OSHA's Review Commission to rule that the 1978 Policy Statement foreclosed OSHA's regulations from applying to railroad operating areas. In *Consolidated Rail Corp.*, the FRA Administrator, John M. Sullivan, provided a letter affidavit strongly asserting the FRA view "that existing FRA regulations constitute a comprehensive exercise of authority over working conditions which are rooted in railroad operations." 10 OSHC at 1579 n. 8.

The FRA continued to claim exclusive jurisdiction over operating areas such as railroad bridges in later corresponding with OSHA. As recently as March 2, 1989, the FRA's Assistant Chief Counsel wrote to the Secretary of Labor advising that fall protection for railroad bridge workers should not concern OSHA:

> As to protection of maintenance-of-way workers performing track maintenance or repair, responsibility for their safety is FRA's according to the Policy Statement issued by FRA March 14, 1978, which delineates respective areas of FRA and OSHA jurisdictional authority. 43 F.R. 10583.
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> ...(T)he Policy Statement provides that "...These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." 43 F.R. 10587....

Appendix N (pp. A82-83).[11/]

[11/] The letter was cited in testimony offered by the Railway Labor Executives' Association in the Congressional Oversight Hearing into Railroad Safety which was conducted in 1990, and is part of the record below.

Finally, in keeping with the Congressional mandate found in the Railroad Safety Improvement Act, 45 U.S.C. §431 (1988), the FRA has, in fact, published its own safety regulations pertaining to railroad bridge workers' fall protection which includes regulations pertaining to nets and safety belts as well as side railings, walkways, etc. 57 Fed.Reg. 28116 (1992).

C. The Illinois Court's Decision Squarely Conflicts With Federal FELA Precedent

As accurately stated by the dissenting Illinois justices: "*Velasquez v. Southern Pacific Transp. Co.* (5th Cir. 1984), 734 F.2d 216, is materially indistinguishable from the instant case" (p. A18).

Velasquez involved a railroad employee who was injured in a fall from a bridge. As here, the trial court denied the defendant's motion *in limine* to exclude evidence of OSHA regulations and permitted plaintiff's expert witness to "explain" to the jury how application of the OSHA regulations would have prevented plaintiff's accident. There too, the OSHA standards were accepted into evidence and the court instructed the jury in a manner akin to the jury instruction provided in this case. *Velasquez*, 734 F.2d at 218.

The *Velasquez* jury also returned a verdict against the railroad defendant reduced by plaintiff's contributory negligence. On appeal, however, the Fifth Circuit held that the OSHA regulations did *not* apply to working conditions on railroad bridges and walkways because the FRA's declaration of March 14, 1978, had clearly displaced OSHA's regulations. *Velasquez*, 734 F.2d at 218. Furthermore, the Court of Appeals concluded in *Velasquez* that the overwhelming prejudice created by plaintiff's repeated references to the inapplicable OSHA

standards constituted reversible error, particularly because the trial court's instructions endorsed the error and invited the jury to think of the railroad as a federal law violator. *Velasquez*, 734 F.2d at 218-19.

In acknowledging *Velasquez*, the court below makes no pretense of engaging in any thoughtful analysis calculated to promote reasonable uniformity and constancy in federal law. The state high court does not even acknowledge the fact that its decision independently expands employer liability under the FELA, contrary to this Court's general admonition that "what constitutes negligence for the statute's purpose is a federal question" to be "governed" by recourse to "federal decisional law." *Urie v. Thompson*, 337 U.S. 163, 174 (1949). *Accord*: *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 507 (1957); *Bailey v. Central Vermont R.R.*, 319 U.S. 350, 352, (1943).

In choosing to ignore not only *Velasquez*, *supra*, but the whole fabric of federal law cited herein, the Supreme Court of Illinois has irresponsibly created independent judicial precedent directly at odds with settled federal law and in opposition to national transportation policy. Thus, plenary consideration of this case by the Court is essential.

II.
THE DECISION BELOW TO ELEVATE AN ISOLATED, RETROSPECTIVE, NON-BINDING STATEMENT OF A FEDERAL ADMINISTRATOR ABOVE CONTRARY FEDERAL LAW IS UNPRECEDENTED

There is still another compelling reason why the state court opinion should not be allowed to remain a disparate part of the fabric of federal regulatory law. That is, the unquestioning deference the lower court pays to the FRA's 1991 "interpretation" of the 1978 Policy Statement. This Court and commentators alike

have cautioned that such agency interpretations must always be measured against a court's best reading of Congress' own overriding intent; the greater constitutional framework of federal law; and the goal of promoting sound regulatory policy.[12/] Moreover, as the dissenting opinion pointed out below, such unquestioning deference is particularly inappropriate when the agency "interpretation" is not even remotely contemporaneous with the regulation it purports to interpret, and is inconsistent with the regulation's policy and language (pp. A15-16).

The divided state court cites this Court's opinion in *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), in support of the blind deference it awards to the FRA's 1991 Notice of Proposed Rulemaking (p. A6). In *Udall*, however, this Court gave deference to an agency's interpretation of federal regulations precisely because the interpretation was consistent with prior agency practice and it was a "*contemporaneous construction*" of the regulation at issue. *Udall*, 380 U.S. 1, 17 (emphasis added). *Accord*: *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417-18 (1945).

Here, of course, the 1991 interpretation of the 1978 Policy Statement could not be defined as "contemporaneous." The non-binding, 1991 interpretation to which the majority of the state court attached "controlling" weight came thirteen years after the 1978 Policy Statement, over seven years after plaintiff's accident, and over one year after the trial of the case was completed. Moreover, the 1991 retrospective interpretation had not been reaffirmed by agency action over a period of time. Instead, the

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[12/] *Consumer Product Saf. Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980); Sunstein, C. R., *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 428 (1989).

1991 retrospective interpretation was contradicted by prior agency statements interpreting the 1978 Policy Statement.

Under such circumstances, the federal courts have consistently held that retrospective administrative interpretations are *not* entitled to significant weight. *Order of Railway Conductors v. Swan*, 152 F.2d 325 (7th Cir. 1945), *aff'd*, 329 U.S. 520 (1947); *Matter of Sinclair*, 870 F.2d 1340, 1342-43 (7th Cir., 1989); *Wisconsin Cheesemen, Inc. v. United States*, 388 F.2d 420 (7th Cir. 1968). *Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.*, 265 F.2d 163 (8th Cir. 1959); *Drew v. Lawrimore*, 257 F.Supp. 659, 669-70 (D.C. S.C. 1966).

Certainly this Court has not deferred to agencies' interpretations of regulations where, like here, those interpretations are wholly unsupported by an agency's prior pronouncements or administrative practices; and where, like here, judicial affirmation of the administrative agency's retroactive interpretation would intrude upon reasonable reliance interests. See, *Heckler v. Community Health Serv.*, 467 U.S. 51, 60 n. 12 (1984); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974); *Atchison, T. & S.F. R.R. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

The deference shown the FRA's 1991 Notice of Proposed Rulemaking by the court below also ignores an administrative proclivity which has long been judicially acknowledged — the tendency of administrative agencies to advance their own private agendas through retrospective public pronouncements.[13/]

[13/] *Consumer Product Saf. Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980); *United States v. United Mine Workers*, 330 U.S. 258, 282 (1947); also see, Sunstein, C. R., *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989).

Indeed, this Court has oft-repeated the warning that even "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960) quoted in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963) and in *Consumer Product Saf. Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 112-113 (1980).

The 1991 Notice was certainly published under unusual circumstances. Gilbert E. Carmichael was now the Federal Administrator and he was under intense Congressional criticism for not responding to the Rail Safety Improvement Act's mandate that the FRA should address fall protection for railroad bridge workers "within one year." 45 U.S.C. §431(n).[14/] More than two years had elapsed, but the FRA had yet to act.

Retrospectively ceding fall protection jurisdiction to OSHA would save agency face by deflecting Congressional criticism with no attendant loss of real agency authority. A retrospective concession of authority to OSHA would suggest to Congressional critics that fall protection had been under some form of active federal supervision, while leaving the FRA free to once more declare that it would henceforth exercise exclusive jurisdiction over the subject matter because bridges presented hazards unique to the railroad operating environment.[15/]

[14/] The record below further reveals that Mr. Carmichael was not affiliated with the FRA in any capacity until 1989. In 1978, at the time the Policy Statement was published, he was a private citizen selling real estate and automobiles in Meridian, Mississippi. (See, Ltr. Brf. filed before Appellate Ct.).

[15/] The comparable rationales by which the FRA justified preempting OSHA's jurisdiction in both 1978 and 1991 is illuminating. Compare 43 Fed.Reg. 10587 (pp. A53-54) with 56 Fed.Reg. 3436 (pp. A71-72).

Of course, the blanket rule of agency deference which the lower court erroneously adopted, did not allow for any questioning of agency motivation, no more than it called for any evaluation of the merits of the contrary federal decisional law or of Congress' overriding intent. The lower court simply adopted the retrospective agency interpretation because it was "not plainly erroneous." Such an unreasoned deference to a non-contemporaneous agency "interpretation" has no place in the fabric of federal law, and should not be allowed to stand. It provides another compelling reason why this Court should review this case.

III.
THE LOWER COURT'S RETROACTIVE APPLICATION OF ITS UNPRECEDENTED INTERPRETATION OF FEDERAL LAW DEPRIVED PETITIONER OF DUE PROCESS OF LAW

The opinion entered by the state court failed to recognize that fundamental principles of due process also shaped its obligation to correctly interpret and apply federal law. As this Court instructed in *Felder v. Casey*, 487 U.S. 131 (1988):

> Just as federal courts are constitutionally obligated to apply state law to state claims...[when exercising diversity or pendent jurisdiction]....so too the Supremacy Clause imposes on state courts a constitutional duty to proceed in such a manner that all the substantial rights of the parties under controlling federal law are protected. [Citations].

Felder, 487 U.S. at 151. *Also see*, *Atlantic Coast Line R. v. Burnette*, 239 U.S. 199, 201 (1915).

Here, the lower court utterly fails in its obligation. First, in disregard of federal precedent, the lower court finds the FRA's 1978 Policy Statement to be "ambiguous" and "unclear" with reference to the phrases "hazardous construction working conditions" and "railroad operations" (pp. A6-8). In reference to

bridge construction in particular, the majority concludes that the Policy Statement is "subject to two competing interpretations which are equally reasonable" -- one that would conclude that the FRA had preempted OSHA from regulating the use of fall protection equipment on railroad bridges and one that would conclude that it had not.

Having made its initial finding of ambiguity in contradiction of federal precedent, the majority then looks to the non-binding interpretation of the 1978 Policy Statement issued by the FRA in 1991. Reasoning that the FRA's 1991 interpretation is controlling unless "plainly erroneous," the majority concludes that the OSHA fall regulations apply to the present case.

In so doing, the court committed error of constitutional proportions. Faced with a choice between "two...equally reasonable" interpretations of the Policy Statement, the court was compelled by fundamental considerations of due process to elect the interpretation which would *not* give the Policy Statement a retroactive effect. As this Court instructed in *Bowan v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988): "Retroactivity is not favored in the law. Thus,... *administrative rules will not be construed to have retroactive effect unless their language requires this result.*" (Emphasis added.) *E.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944).

The language of the Policy Statement did not require the lower court to apply the Statement retroactively to North Western's prejudice. The lower court, itself, found that the Statement was "ambiguous" and subject to "two...equally reasonable" interpretations. Clearly then, the Court erred in electing the 1991 interpretation for to do so would give that interpretation retroac-

tive effect without providing North Western with fair notice of the conduct that was required of it.[16/]

There is no more fundamental principle ingrained in Anglo-American law than that which requires that the law speak with reasonable clarity. As definitively stated by this Court, "a statute or regulation which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 665 (1985).

Nor may it be logically reasoned that the threat posed to due process of law by the retroactive enforcement of the "ambiguous" regulation might be cured by the original jury's finding of railroad negligence. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court explained that the interpretation of "ambiguous" regulations or statutes may not be delegated to a jury for *ad hoc* resolution:

> ...Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. [Citations] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [Citations] A vague law imper-

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[16/] Indeed, the FRA's 1991 Notice, itself, conceded that its unique interpretation of the explicit language used in its 1978 Policy Statement had previously eluded everyone, *including the FRA's own safety inspectors*: "(T)hese distinctions have proved confusing to the regulated community, railroad employees, inspectors, and in some instances, adjudicatory bodies." 56 Fed.Reg. 3435 (p. A70).

> missibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [Citations].

Grayned, 408 U.S. at 108-09.

There exists voluminous federal precedent holding that civil penalties may *not* be levied against an employer for alleged violations of ambiguous OSHA regulations which do not provide reasonable notice of the conduct which is required of the employer. See, *e.g.*, *S & H Riggers & Erectors, Inc. v. Occupational Saf. & H. Rev. Comm'n.*, 659 F.2d 1273 (5th Cir. 1981); *Brennan v. Occupational Saf. & H. Rev. Comm'n.*, 513 F.2d 713 (8th Cir. 1975); *Kent Nowlin Const. Co. v. Occupational Saf. & H. Rev. Comm'n.*, 593 F.2d 368 (10th Cir. 1979); *Diamond Roofing Co., Inc. v. Occupational Saf. & H. Rev. Comm'n.*, 528 F.2d 645 (5th Cir. 1976).

The holdings of all such cases is appropriately summarized in *Kent Nowlin Const. Co.*, quoting from *Diamond Roofing*, as follows:

> An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, *and it must provide a reasonably clear standard* of culpability to circumscribe the discretion of enforcing authorities and its agents (emphasis added).

Kent Nowlin Const. Co., 593 F.2d at 371.

Here, accepting the lower court's characterization of the federal regulatory scheme as "ambiguous," the FRA's 1991 clarification did not become available until 7 years *after* plaintiff's accident and almost two years *after* this case was tried. Such

circumstances did not impose a "reasonably clear standard" and did not give the North Western reasonably clear notice of the need for compliance with the OSHA standard at the time of plaintiff's accident in 1984.

The opinion entered by the state court, which retroactively penalizes North Western by upholding the $3.5 million verdict entered against it, raises constitutional issues of considerable consequence. The opinion below does not grow out of the greater constitutional framework of federal law; it collides with it. Fundamental considerations of due process, therefore, mandate that this case be fully reviewed by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

HUGH C. GRIFFIN
LORD, BISSELL & BROOK
115 South LaSalle Street
32nd Floor
Chicago, IL 60603
(312) 443-0342

GEORGE H. BRANT
Counsel of Record
JAMES P. DALEY
RONALD J. CUCHNA
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY
165 North Canal Street
Chicago, IL 60606
(312) 559-6081

Counsel for Petitioner